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IN THE

Supreme Court of the United States

JUNE TERM, 1931—No. 217

WILLIAM STEVENS,

Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE APPLICATION OF THE PETITIONER FOR A WRIT OF CERTIORARI.

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FLORENCE J. SULLIVAN,
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New York City.

HENRICKS & LUDEMANN, INC., New York City

Subject Index.

PAGE

Introduction 1

POINT I—The petitioner is asking the Court to change the doctrine of *stare decisis* 36

POINT II—The United States District Court rendered its decision under a libel not before the Court .. 44

POINT III—The tow "Drifter" was not in bail to the "White City" 47

POINT IV—The petitioner now seeks to sustain a judgment granted by the District Court on the theory of a "libel sounding in contract," on rules confined to and peculiar to negligence which is *ex delicto* 49

POINT V—The decision in the District Court was based on an erroneous holding that the "White City" was bailee, insurer and a common carrier 52

POINT VI—The petitioner's motions in the United States Circuit Court of Appeals for re-argument and for certification of questions of law, were denied 55

TABLE OF CASES CITED.

Ames v. Belden, 17 Barb. 513 54
Alexander v. Greene, 3 Hill (N. Y.) 9 38
The Atlantic City, 241 Fed. 64 41
The Bear, 11 F. (2d) 607 43
The Clarence L. Blakeslee, 243 Fed. 366, 367 (79 C. C. A. 431) 40, 41
Bouvier's Law Dictionary (1928), page 165 50
The Buttercup v. United States, 8 F. (2d) 282 42
Cleary Bros., Inc. v. Port Reading R. Co., 29 F. (2d) 496 43
The E. B. Conine, 233 Fed. 987 (147 C. C. A. 661) .. 41

PAGE

Cyc., Vol. 36, page 74 ..... 53, 54
Dameron-White Co. v. Angola Transfer Co., 19 F. (2d) 14 42
The L. P. Dayton, 120 U. S. 337, 351 (7 Sup. Ct. 568; 30 L. Ed. 669) 41
Delaware Dredging Co. v. Graham, 43 F. (2d) 852 .. 52
The J. P. Donaldson, 167 U. S. 599, 603 (17 Sup. Ct. 951; 42 L. Ed. 292) 42
Eastern Transportation Line v. Hope, 95 U. S. 297, 299, 300 (24 L. Ed. 447) 36, 38
The W. E. Gladwish, 196 Fed. 490 (116 C. C. A. 185) 40
Hyland v. Paul, 33 Barb. 241 54
The Frederick R. Ives (D. C.), 25 Fed. 447 41
The R. B. Little, 215 Fed. 87 (131 C. C. A. 395) 42
O'Brien v. Blunt, 5 App. Div. 223 46
People v. Dumar, 106 N. Y. 508 46
Pope v. Kelly, 30 App. Div. 254, 255 46
The Radnor, 21 F. (2d) 982 43
The Sea King, 265 Fed. 418 42
The Sea Lion, 12 F. (2d) 124 43
Southern Ry. v. Prescott, 240 U. S. 640 53
Southgate v. Eastern Transp. Co., 21 F. (2d) 47 42
State v. Meagher, 44 Mo. 356 54
Steinbach v. Fire Relief Insurance Co., 77 N. Y. 501 .. 23
The John G. Stevens, 170 U. S. 125 44
Talcot v. Commercial Ins. Co., 2 Johns. N. Y. 124 .. 55
United States v. Port of Portland, 300 Fed. 727 41
Varuck v. Young, 149 App. Div. 466, 467 46
The Webb, 14 Wall. 406, 413, 414 (20 L. Ed. 774) .. 29, 36
Weed v. First National Bank, 106 App. Div. 287, 288 46
The White City, 48 F. (2d) 557 (1931 A. M. C. 1844; Transcript of Record 413; 35 F. (2d) 1006; Transcript of Record, p. 306) 28, 36
The Winnie, 140 Fed. 725, 726, 727 ..... 39, 40
Work v. Leatherer, 97 U. S. 379, 380 ..... 53, 54
Young v. Lamy, 135 N. Y. 576 55

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The Opinions of the Courts Below in this Action.

The opinion of the United States Circuit Court of Appeals is reported in

48 F. (2d) 557; 1931 A. M. C. 1844; and is also printed at page 413 of the Transcript of the Record.

The opinion of the District Court of the United States for the Southern District of New York is reported in

35 F. (2d) 1006; and printed in the Transcript of Record, page 306.

The petitioner is asking the Court to overrule the doctrine of stare decisis in this class of cases in the United States Supreme Court and in other courts, to the end that he may recover on his assigned claim of $1,410.35 (p. 329).

As this application is based on the full record in this action which was before the United States Circuit Court of Appeals, and, therefore, searches all the law and facts, it is highly desirable on the part of the respondent to here

present the informative and controlling elements of the record as clearly and briefly as possible and in order in a condensed narrative form. To that end, we beg the indulgence of the Court.

The History of this Litigation.

The contract on which all this litigation is based, is in the form of a letter, which in full is as follows:

"LIBELLANT'S EXHIBIT I, OFFERED AT TRIAL
(May 9, 1929, pp. 297-298).

Telephone
Cable 'Excellent, New York' Sedgwick 7800

JOHN J. AMORY
President
WILLIAM J. PARSLOW
Vice-President
BRUCE SCRIMGEOUR
Sect. & Genl. Mgr.
WILLIAM K. PARSLOW
Treasurer

Designers & Builders of
Pleasure and Commercial
Craft and Their
Propelling Machinery

Speedway
CONSOLIDATED
SHIPBUILDING CORPORATION.
Morris Heights, New York City
Formerly
Gas Engine & Power Company and Charles L. Seabury
& Company Consolidated.

October 13, 1925.

Mr. Alec Simpson,
151st St. & Hudson River,
New York City.

Dear Alec:

Confirming our telephone conversation of this day, and agreement, please have your work boat 'Hilda'

here at our works on Monday morning, the 19th, at 6 A. M. to tow 45' launch on cradle from Morris Heights to the Trans Marine Steamship Company, alongside of steamer 'Suscolanco' at Port Newark, N. J.

See Captain Lewis on arrival at pier. It is important that this boat arrive at the steamer before 3 P. M. that same day.

Yours very truly,

CONSOLIDATED SHIPBUILDING CORPORATION,
W. A. ROOS, JR.,
Sales Dept.

WAR:T" (pp. 297-298).

This contract was never assigned to William Stevens or anybody else. It is just where it was on the date it was made.

By mutual consent of the parties to this letter, changes were made with respect to its provisions and as changed, was carried out on October 19th and 20th, 1925.

The changes made were as follows:

1. The work boat "Hilda" referred to in the letter became disabled before October 19th, 1925, and could not be used; this accident occasioned about two hours delay in starting to tow.

2. In the emergency resulting from the work boat "Hilda," being out of order, the "White City," a pleasure motorboat similar in style and design to the "Drifter" was substituted. The "White City" was not a tug boat.

WILLIAM A. ROOS, JR., in the Sales Department of the Consolidated Shipbuilding Corporation who signed the letter, testified for the petitioner, about the substitution

of the "White City" for the "Hilda," at page 55, folio 165, as follows:

> "Q. Will you give it?
>
> A. They said that they could not send the 'Hilda,' but would send another boat. I said, 'Well, if the boat is big enough,' and he gave me the dimensions, and I said, 'That's agreeable to me,' something like that.
>
> Q. Did he mention the name of the boat he was going to send?
>
> A. Yes; the 'White City.'"

Alexander Simpson to whom the letter is addressed, at page 349, explains why he could not tow the "Drifter" with his work boat "Hilda"; "something happened to it; the boat was broken down; she couldn't go." In reply Roos said:

> "Well, why don't you let the boys tow it." "I (Alexander Simpson) says: 'All right.' So the boys own the 'White City,' sent her over there; they took her over" (p. 349, fols. 7 to 9).

The "boys" were Herbert N. Simpson, son of Alexander Simpson, and William A. Rhodes, his son-in-law (p. 80, fol. 238). They were engaged in excursion business (p. 80). William A. Rhodes was a motorboat captain and was licensed as such (p. 82). The "White City" "was a party boat, an excursion boat; it was not a tug boat" (p. 96, fol. 287). William A. Rhodes and Herbert N. Simpson owned the "White City" (p. 382, fol. 108). It was used for pleasure purposes and for transportation of passengers on excursion trips (p. 383, fol. 109).

Before Alexander Simpson's work boat, "Hilda," also called "Hilda" 2d, broke down, he was to do the towing of the "Drifter" with his work boat "Hilda" (the letter, also p. 349, fol. 7).

The Status of the Consolidated Shipbuilding Corporation in this Action.

There were two contracting parties with respect to the towing of the "Drifter" as appears from the letter above printed, and also, from the statement of petitioner's counsel in opening the case in the United States District Court.

The party that wanted the towing done, was the Consolidated Shipbuilding Corporation that built the motorboat "Drifter," and the party to do the towing was Alexander Simpson. At that time, the Shipbuilding Company was the owner and in possession of the "Drifter"—it had not been delivered to Mr. Frost for whom it was built, and was not until about a month later. All doubt is removed as to ownership at page 64, folios 190-191, where Mr. Roos testifies as follows:

> "The Court: Then you remember that Frost did not own it (the 'Drifter') at that period?
>
> A. As I recall it, he instructed us to deliver it to the Steamer.
>
> Q. Then the boat (the 'Drifter') was at your risk?
>
> A. Yes, sir."

The trial counsel for the petitioner, at page 46, fols. 137-138, makes this point very clear indeed:

> "Mr. Freehill: We established that the contract was made with Alex Simpson, the father. He did not own the 'White City.' We joined the two owners of the 'White City,' as there was doubt about which of the parties was liable on the contract of towage. The Court held that the contract was made with Alex Simpson, and that he had hired these two boys as his agents, and that Alex Simpson was responsible on the contract, but on that action we could not hold them for negligent towage, because we were suing on the agreement."

The Petitioner is still suing on this contract in this action that has never been assigned to him by the Consolidated Shipbuilding Corporation. He also has an action on it pending in the State Court.

The Contract Between the Consolidated Shipbuilding Corporation and T. C. Frost, a Resident of Texas.

This contract provided that the Shipbuilding Corporation that constructed the "Drifter" for T. C. Frost of Texas, would make delivery of the same to the Steamer "Suscalanco" at Port Newark, New Jersey. Captain Lewis was the Superintendent for the Steamship Company that was to transport the "Drifter" to Texas. For reasons stated herein, the "Suscalanco" sailed from Port Newark in the afternoon of October 19th, 1925, before the "Drifter" arrived. The Consolidated Shipbuilding Corporation did not deliver the "Drifter" to T. C. Frost until after October 19th, 1925 (p. 63, fol. 189). Delivery was actually made about November 5th, 1925 (p. 276, fol. 827).

On October 20th, 1925, Albert Bauer, an employee of the Consolidated Shipbuilding Corporation, in charge of shipping, received the "Drifter" at Port Newark (p. 71). He was there waiting to receive the yacht and see it put aboard the ship (p. 72, fols. 214, 215). Because of the damages to the "Drifter," Mr. Bauer who was in charge of the shipping for the Consolidated Shipbuilding Corporation, did not deliver it to the Steamship Company but immediately brought it back to the Consolidated Shipbuilding Corporation for repairs, to its place of business at Morris Heights, New York City.

There is no doubt about the time when the "Drifter" was delivered by the Consolidated Shipbuilding Corporation to T. C. Frost of Texas, for whom the boat was built. This appears from the testimony of William J. Bolen who

was called by the petitioner at page 191, folio 573. At page 192, folio 576, Mr. Bolen testified:

> "Q. By whom were you employed?
> A. The Consolidated Shipbuilding Corporation."

Continuing at page 193, folios 577-578:

> "Q. What are your duties?
> A. I am cashier of the company and issue all orders to the shop for work to be done. All orders go through my hands."

The same witness testified at page 276, folio 827:

> "Q. And where was delivery to be made?
> A. At Port Newark—he (meaning Mr. Frost) named the steamer that he would like it to go on.
> Q. Had you made delivery of the boat when it went down?
> A. No, sir.
> Q. At the time it was damaged?
> A. No, sir.
> Q. When was delivery made?
> A. Delivery was made about the 5th of November I think it was, somewhere in that neighborhood."

It is clear, without argument, that up until the boat was delivered to Mr. Frost for whom it was built, it was the property of the Consolidated Shipbuilding Corporation and in its possession.

There is no explanation in this record from the petitioner why he did not obtain an assignment of the contract to him made between the Consolidated Shipbuilding Corporation and Alexander Simpson. The cause of action, if ever one existed, is confined to that contract. There is still pending an action in the State Court between William Stevens and Alexander Simpson (p. 308, fol. 923).

The facts in this case especially in the absence of any explanation to the contrary, make it conclusive:

1. That the Consolidated Shipbuilding Corporation had no contractual relations with the owners of the "White City"; but did have with Alexander Simpson;

2. That the "White City" did precisely what the Consolidated Shipbuilding Corporation directed through its own Captain Weston who was in charge of the towing;

3. That there was no negligence on the part of the "White City"; but there was negligence on the part of the Consolidated Shipbuilding Corporation;

4. That the damage to the "Drifter" even if it occurred during the voyage, was one of the perils of the sea about which the Consolidated Shipbuilding Corporation knew, and which was called to the attention of Mr. Roos in charge of the Sales Department, before October 19th, 1925, by Alexander Simpson;

5. That T. C. Frost had no contractual relations with either Alexander Simpson or the owners of the "White City," and had no cause of action to assign against them.

6. That the alleged assignment from T. C. Frost to the "Dummy," William Stevens, referred to in the libel at page 5, folio 14, and in the amended complaint of the petitioner in his former action in the State Court (Municipal Court of the City of New York, p. 31, fol. 92) was for the sole purpose on the part of the Consolidated Shipbuilding Corporation, to escape from its contract with Alexander Simpson. This whole transaction is a sham and a subterfuge;

7. The Consolidated Shipbuilding Corporation committed a gross act of negligence as a matter of law

when its Captain Weston in charge of the towing, abandoned the "Drifter" at Fisher's Dock on the night of October 19th, 1925, during the course of the voyage and before the point of destination was reached; without him the crew was insufficient (p. 285, fol. 854). The particulars of this abandonment appear at page 90, folio 268;

8. The Shipbuilding Corporation in truth and in fact, did the towing of the "Drifter" and deliberately gambled with the dangers encountered and the damage to the "Drifter."

If the gamble were successful it would have saved $75.00 on the towage.

The Consolidated Shipbuilding Corporation as appears above, knew that the "White City" was not a tug or a work-boat and that its owners, the "boys" were not in the tug business. *The "White City" was pressed into service in an emergency arising from the break-down of the work boat "Hilda" that was to do the towing.* To save money, it employed two "boys" who had a pleasure motor boat, the "White City" to make the trip. This boat was similar in construction to the motor boat "Drifter" (p. 383, fol. 110). In this way, the Consolidated Shipbuilding Corporation saved $75.00 for the alleged towing by the "White City," which was one-half the charge if the towing was done by a tug. The regular towage would have been $150.00 if done by a tug. This is the testimony submitted in behalf of the petitioner and appears at page 402, folio 168; the item there is as follows:

"Tug Boat Charges to & from Steamer $150.00."

This was for towing the "Drifter" back from Port Newark after the damage. This was not done by the "White City." All the "boys," Herbert N. Simpson, and William A. Rhodes, the owners of the "White City" got was $75.00.

This sum was paid by the Consolidated Shipbuilding Corporation to Alexander Simpson, and by him turned over to the "boys," the owners of the "White City." This appears from Libellant's Exhibits 3 and 4, printed at pages 303-304, and page 357, folio 31. The check for the payment of this $75.00 was made by the Consolidated Shipbuilding Corporation to the order of Alexander Simpson (p. 304) and endorsed by him and turned over to the owners of the "White City" (p. 385, fols. 115, 116).

The towing of the "Drifter" by the "White City" was under the direct control of the Consolidated Shipbuilding Corporation.

This statement is true as a matter of record.

1. The contract fixed the starting point and destination which determined the course (pp. 297-298).

2. Captain Weston in the employment of the Shipbuilding Corporation was placed in charge of the tow and left with it.

Page 286, folios 856-857 (Mr. Bolen testifying):

"Q. Was Weston a laborer?
A. He was a dockman.
Q. A dockman?
A. Worked down on the dock.
Q. And he left with the 'White City' and the 'Drifter' on October 19th, 1925, to go to Port Newark to make delivery of the 'Drifter,' is that it?
A. Yes, sir; he did."

Page 285, folios 853-854:

"Q. Why did he (Weston) go down?
A. To help the delivery of the boat—he was on the 'Drifter.'

Q. Why did he go at all?

A. They didn't have sufficient help on the boat to take care of it."

Mr. Roos testifying at page 58, folio 174:

"Q. No; do you recall that?

A. Yes. The company did place a man on that boat.

Q. What company?

A. The Shipbuilding Company.

Q. Why was he placed there?

A. Because it is the custom to have a man go alongside of the steamer to take a line on the dock, *to see that the boat is fended off on the dock.*"

At page 62, folio 184:

"Q. How long had he (Weston) been a boatman?

A. He worked for Tom Turner. He had been captain on boats and engineer. I had known him for many years before this.

Q. And you say he was competent to take care of this boat and do everything with reference to the 'Drifter'?

A. As to his duties, yes, sir. He was competent to perform his duties."

Folio 185:

"Q. Was he in charge of the 'Drifter'?

A. Yes, sir."

The "White City" arrived at the Consolidated Shipbuilding Corporation plant on the Harlem River about 8:30 in the morning of October 19th, 1925, and layed out in midstream a half hour before the employees of this company finished the work of attaching the "Drifter" and the cradle

belonging to it. These employees used a rope about 40 feet long to connect the "White City" with the "Drifter" and another rope about 40 feet long to connect the cradle to the "Drifter." The tow started about 9:00, in the following order:

> "White City" manned by Herbert N. Simpson and William A. Rhodes;
> "Drifter" manned by Captain Weston;
> The cradle being connected with the "Drifter."

It is between 25 and 30 miles from Morris Heights to Port Newark (p. 105, fol. 313). Captain Weston and the employees of the Consolidated Shipbuilding Corporation supervised and actually did the work incident to the starting of the tow. The course was down the Harlem River to the East River, across the Upper Bay, through Kill van Kull, and to Newark Bay, to the Transmarine Corporation (pp. 84, 85). This course was selected by the Consolidated Shipbuilding Corporation through Captain Weston. Mr. Roos, in charge of the Sales Department of this corporation was present at the shipyard as the tow started (p. 58, fol. 172).

As appears herein, the course selected by the Consolidated Shipbuilding Corporation was inherently dangerous, especially to the "Drifter," whose exterior covering was only a half inch thick. The testimony of Albert Bauer, shipping clerk, on this point is printed at page 109, folio 326:

> "The Court: And how thick was the side of the boat?
> The Witness: The plank in the hull I don't think was more than half an inch. Something like that. I don't think it was half inch planking" (also at p. 94, fol. 281).

The Consolidated Shipbuilding Corporation did not put any fenders on the sides of the "Drifter," nor did it otherwise protect the sides of the "Drifter," which was not made for rough water (p. 94, fol. 281).

Before October 19th, 1925, Alexander Simpson called the attention of Mr. Roos to the inherent dangers of the waters through which the tow would have to pass down the Harlem River, and advised Mr. Roos to let him take the "Drifter" over to his boat house on the Hudson River at 151st Street. Testimony on this point given by Alexander Simpson, is printed at page 350, folio 11:

> "Q. Tell us what you said to him.
>
> A. And I said I would take it over to my place and leave it over there over night, and take it down the next morning, *if the conditions would be right.* Well, he said, 'No, you can't do that. *You must take it the day you are going to take it to Port Newark.*' "

Folio 12:

> "Q. What did you say about the tide?
>
> A. Well, I said the tide would be in our favor in the morning early to take it from our place if I got it the day before.
>
> * * * * * * * *
>
> A. If you have a tied against you, it is very hard pulling, and you get all the drift-wood against you; you are forcing up against the drift-wood the conditions is against you all the way."

Page 351, folio 1:

> "That is what I said to Mr. Roos."

Folio 14:

> "Q. That was before the 'Drifter' was taken down to Port Newark?
>
> A. Yes, sir."

Page 352, folio 17, states that he had been in the boat business for 28 years and that he was familiar with the waters, and at folio 18 (p. 352), he states that he frequently found heavy logs and drift-wood in these waters. At folio 19 (p. 353), he stated that "sometimes you will get a stout one going down with the draft, and sometimes you will get half of a beam going down with the draft."

Folio 20 (p. 353):

"By the Court:

Q. There is liable to be anything going down?

A. Sure, there is liable to be anything going down."

Folio 21 (p. 353):

"Q. You have heard the description of the injury to this boat, the 'Drifter,' described here, about the water-line?

A. Yes, sir.

Q. And this that we speak of, would that cause that damage?

A. Of course it would, yes."

At page 354, folio 22, the witness continues:

"Well, the logs, sometimes they have got spikes in them; sometimes they have got bolts in them. They are apt to have anything in them."

At folio 23:

"Q. And if the 'Drifter' was being conveyed out against the tide and the floating logs and wood coming against it, would that increase the danger?

A. That would do the damage."

At page 390, folios 130-131, further evidence is given as to the perils of the waters through which the towing was done:

> "Q. The heavier the log, the more submerged it is, floating towards the top?
>
> A. When it is waterlogged, twenty feet of it may be submerged and one foot may be on the water surface.
>
> Q. And going against the tide, with the drift-wood coming with it, would that increase the danger of drift-wood?
>
> A. Yes."

Folio 132 (same page):

> "Q. Could the damage that Mr. Bauer showed you have occurred from contact with drift-wood?"

Page 391, folio 133:

> "A. It could."

The course actually taken by the tow under the direction of Captain Weston brought this thin-shelled "Drifter" through the most dangerous waters on the Atlantic Coast. This place is known as Hell Gate (p. 85, fol. 255) and is about Ninety-sixth to Ninety-second Street, East River (p. 86). The witness states:

> "The condition at Hell Gate,—the water is very rough and very bad, and on account of the cross currents, there's five currents come in at one place, and it's a narrow channel" (p. 86, fol. 256).

Had Mr. Roos followed the advance of Alexander Simpson, Hell Gate would have been avoided and the "Drifter" would have been taken up the Harlem River and down the Hudson River to the Simpson Boat House.

When the tow, consisting of the "White City," the "Drifter" and cradle, was in the East River, just below Hell Gate, under the Queensboro Bridge, the line connecting the cradle with the "Drifter" broke. This line, the rope, belonged to the Consolidated Shipbuilding Corporation and placed there by it. Testimony in that respect is at page 86, folio 258:

> "Q. I was asking what happened.
>
> A. That line broke, the line that was attached from the cradle to the 'Drifter' broken underneath Fifty-ninth Street Bridge, and Captain Weston called our attention to it, so we immediately turned around and he hooked on to the cradle again and we proceeded on our way."

This delay was from fifteen or twenty minutes to a half hour (p. 87, fol. 259).

Page 87, folio 260, the witness continues:

> "We came down the Bay and through Kill van Kull and we saw the 'Suscalanco,' the steamer that was supposed to take this 'Drifter' on her deck, we seen her going out, and she was under power."
>
> "Q. What time was this?
>
> A. Around five o'clock; maybe it was a little bit earlier. It was around that, in the evening. And so Mr. Rhodes says, 'I don't know what to do. We better go in and call up. There's the boat that the "Drifter" is supposed to go (fol. 261) on. You'll have to call up and see if they have made any different arrangements, and we called to Weston," and he said, *'Yes, pull into a dock and find out.'* So we went into the dock and he went to call up, and when he came back and he said that the party up there at the Consolidated seemed to be a watchman of some kind, and the only think he could say was to bring the boat back."

Then they called up Alexander Simpson and "he said that the boat was to go on another steamer, *that the orders were changed.* He said that we should take the boat to Port Newark that next day (p. 88, fol. 262) or as soon as we could get there. So we come back to the dock (Fisher's Dock at Bayonne, fol. 260) and we made the 'Drifter' fast alongside of the pier there and made the 'White City' fast, and we put fenders over the side and we stayed there over night."

"Q. What was done with the 'Drifter'?

A. This was at Fisher's Dock, at Bayonne. The 'Drifter' was tied alongside of the dock and we put on big round rubber tires, fenders, to fend her off from the dock, so that she wouldn't bang or scratch or hurt herself. This was precisely what Mr. Roos directed" (pp. 58-59, folios 174-175),

Folio 263:

"Q. Is this smooth water, or rough, or what?
A. Smooth. It's inside.
Q. You go in some distance to get in there?
A. Yes, sir."

The witness states that it is a dock like the Erie Basin.

"Q. Where did you stay that night?
A. On the 'White City.'
Q. How far was the 'Drifter' from the 'White City'?
A. Maybe about fifteen feet, ten or fifteen feet."

Folio 264:

"Q. Why didn't you continue on to Port Newark on the night of the nineteenth?"

Folio 265:

"A. Because it was getting darker just then and we thought it would be much better if we got an early start in the morning and took her out in daylight. Also because of change in the orders" (pp. 87-88, fols. 260-262).

The next morning, the owners of the "White City" got up about five o'clock (fol. 266) and looked over the boats and discovered nothing wrong with them (fol. 267).

Captain Weston left the tow about 7:00 or 7:30, on the night of October 19th, 1925 (p. 89, fol. 267). The following testimony is given by Herbert N. Simpson:

"Q. What had become of Weston?

A. He left the night before. He said he wanted to go home."

Page 90, folio 268:

"Q. What time did Weston leave the tow?

A. On the nineteenth, the night before, around seven or seven-thirty, *after he had the boat tied up alongside of the pier.* He said, 'I'm not going to stay around here all night.'"

Fisher's Dock where the tow tied on the night of October 19th, 1925, is about five or six miles from Port Newark (p. 90, fol. 269). On the morning of October 20th, 1925 (fol. 269), the "White City" with only two of the crew left, Herbert N. Simpson and William A. Rhodes, Captain Weston having left the night before, proceeded from Fisher's Dock to Port Newark, starting about 6:30 A. M. and arrived at Port Newark between 7:30 and 8:00 o'clock that morning.

The Libel.

The libel is printed at pages 4 to 6. The facts constituting the alleged cause of action are not printed.

The trial counsel for the petitioner attempted to define the alleged cause of action set up in the libel at the opening of the trial in the United States District Court. What he there said is printed at page 100, folio 300, and is as follows:

> "Mr. Freehill: Under this contract he was to take the 'Drifter' to Port Newark, and if he went off his course and did not make delivery at the time and place specified in the agreement, that is a breach of contract, deviation."

There is no evidence that anything happened during the "deviation."

The libel contains no allegations charging negligence. There is not a word of evidence of negligence in the case as against the "White City." The evidence quoted herein shows that the "White City" did not deviate from its course and followed the changed order of the Consolidated Shipbuilding Corporation. The alleged "deviation" was short and to 'phone for further orders. The facts in this respect are printed at pages 87-88, folios 261-263. There is not a word of evidence that anything happened during the alleged deviation. The alleged deviation was the result of changed orders and was also an act of care and caution on the part of the "White City" to avoid the dangers of the night. The abandonment by Captain Weston left the tow insufficiently manned.

The Answer.

The answer is printed at pages 8 to 38, and briefly stated, pleads a general denial (p. 9), and two separate defenses (p. 9, fol. 27 and p. 19, fol. 55).

The substance of the first defense is, that to the knowledge of the Shipbuilding Corporation, the "White City" was not a tug, that it was a pleasure boat; that this corporation controlled and did the towing of the "Drifter," and that the owners of the "White City" were under the immediate control and direction of this corporation, and complied in all respects with its directions, and that they acted in concert with the other employees; that all attachments, ropes, hawsers and all necessary items relating to the tow, including its own captain, Captain Weston, were furnished and placed in charge of the tow by the Consolidated Shipbuilding Corporation (pp. 9 to 19).

The second defense sets forth previous and identical litigation and subject matter between the parties to this action that were determined in favor of the owners of the "White City," and that that result was a bar to this action and *res judicata* as to person and cause of action.

The Action of William Stevens (the Libellant Here) in the State Courts.

This litigation was started by William Stevens on March 27th, 1926 (p. 27, fol. 81), in an action in the Municipal Court of the City of New York, Borough of Manhattan, First District (p. 27). The only plaintiff then, was William Stevens, the petitioner here, and Alexander Simpson was the sole defendant (p. 27).

The complaint in the cause of action in the State Courts between the same parties, set out the same facts as are here included in the libel. In his decision and opinion in this action in the United States District Court, Judge Woolsey (p. 307, fol. 921) held as follows:

> *"The issues between the plaintiff and Herbert N. Simpson and William A. Rhodes in the Municipal Court case seem to have been substantially the same as they are here."*

This opinion (p. 308) shows that the State Court action was resolved in favor of said Herbert N. Simpson and William A. Rhodes, owners of the "White City" and thereafter it was confined to William Stevens, plaintiff, against Alexander Simpson, defendant (that action is still pending in the State Court; at the trial, the jury disagreed).

Before that action was started in the Municipal Court, William Stevens never had any dealings with the owners of the "White City" nor with Alexander Simpson. There is not a word of evidence in this prolonged litigation to the contrary. Who William Stevens is or what he did does not appear in this case.

His relation to the subject matter of this litigation is that of a person gambling with the State and United States Courts and their processes; it is tantamount to champarty.

He was defeated in the State Courts by the owner of the "White City" on the claim in this action (Opinion of Judge Woolsey, pp. 307, 308) (p. 46, fol. 138).

The action in the State Court was in negligence and specified the same facts as are contained in the libel in this action (pp. 30 to 32, as to the complaint; pp. 4 to 7, as to the libel). The libel sets up a breach of contract; no negligence is alleged. It is a towage contract, simpliciter, and does not put the tow in bail to the tug (Opinion U. S. Circuit Court of Appeals, in the case at bar, 48 F. [2d] 557, and cases cited).

The owners of the "White City" were brought into the State Court action on the application of William Stevens by an order of the Municipal Court dated May 17th, 1926. The amended complaint bringing them in was verified by him, and at paragraph "Seventh" thereof (p. 31, fol. 93) contains this statement by him:

> "SEVENTH.—That plaintiff is in doubt as to which of the defendants is liable and, therefore, under Sections 213 and 219 of the Civil Practice Act, joins them all to the intent that the Court may determine which of the said defendants or all of them are liable."

That court did *"determine"* on December 8th, 1926 (p. 299, fol. 896) that the owners of the "White City," Herbert N. Simpson and William A. Rhodes were not "liable" and the action was dismissed as to them (Opinion, p. 308, fol. 923).

The good faith of Stevens when he swore to that paragraph is open to grave doubt as he was in possession of the assignment before he started the first action against Alexander Simpson as sole defendant (p. 27 and 31, fol. 92). There was only one assignment (p. 51, fol. 151).

For reasons of his own, William Stevens, brought his first action in the First District Court of Manhattan. Neither plaintiff nor defendant in that action, resided in that district. If he did not know that that was the wrong district, his attorney certainly did. This made it necessary for defendant to make a motion to change the place of trial to the right district. This motion was granted. This selection of the wrong district had a purpose; it was not an accident.

The Municipal Court action was tried on December 7th and 8th, 1926, in the 7th District before Judge Davies and a jury. The judge dismissed the action as against the owners of the "White City," and no appeal was ever taken from that order on dismissal by the plaintiff therein, William Stevens. His right to appeal has expired. He had only 20 days from December 8th, 1926, to so appeal. The only defendant then left was Alexander Simpson and as to him the jury disagreed; that action has not been tried since. It is still pending.

Nothing further was done by Stevens until June 20th, 1927, when the libel was filed in the above entitled action in the United States District Court (p. 1).

It is as evident as though printed in words, what William Stevens had in mind before and at the time of filing the libel.

He then knew that the State Courts had passed on his claim and held that there was no liability therefor on the

part of the "White City" or its owners, Herbert N. Simpson and William A. Rhodes.

He knew that the decision of the State Court was right and could not be reversed and took no appeal.

He knew that he could devise no other form of action on his claim that would be entertained by the State Courts. He was forever barred therefrom as against the "White City" and its owners.

After a delay of over six months (from Dec. 8th, 1926, to June 20th, 1927), he brought the present action in the United States District Court. Instead of making the owners of the "White City" parties to the action, he confined it to the "White City" omitting the owners.

In form, at least, this gave him a paper difference in the name of the defendant. In this way, he sought to avoid identity of person in the action in the State Court and the United States Distfict Court. This was a failure as the decision in the United States Circuit Court of Appeals shows.

Even with all of this his trouble was not over in his new venture.

Some method had to be devised to give at least a paper difference in the subject-matter of the controversy in the State and United States Courts.

No matter in what court his assigned claim for damage was tried he knew it would have to survive or perish on the contract made between the Consolidated Shipbuilding Corporation and Alexander Simpson referred to and printed at pages 297, 298 (Libellant's Exhibit I).

The cause of action in the State Court was for negligence; so in his libel he sets out a cause of action on contract, in an effort to make it appear that the subject matter in the State Court is different from that in the United States Court. This is also a failure on its face. It is a failure as a matter of record; the camouflage is ineffective; it is a sham pleading (*Steinbach* v. *Relief Fire Ins. Co.*, 77 N. Y. 501). A change in issues, that is, a

change in the complaint is not a change in parties or subject matter (77 N. Y. 501).

The young attorney in the office of the attorney of record for the petitioner, who has had charge and control of the assigned claim of William Stevens and all actions in the four counts it has been in so far (the First District Municipal Court, Borough of Manhattan; the Second District of the same Court; the United States District Court; and the United States Circuit Court of Appeals) personally tried the action for the petitioner in the United States District Court, where Judge Woolsey asked Mr. Freehill, the attorney for the libellant the following question (p. 45, fol. 135):

"The Court: Mr. Stevens was the party, as assignee, of the same man suing in the Municipal Court?

Mr. Freehill: It was an action on contract there, not for negligent towage.

Mr. Sullivan: No it was negligence. I have the charge of Judge Davies right here, and I have their complaint. There is no shift on that. They are the identical parties and it is the same subject matter.

Mr. Freehill: This is a different type of action (Mr. Freehill's idea is that if a complaint in negligence is changed to one on contract although he retains the same parties subject matter and evidence, he can avoid the rule relating to *res adjudicata*. The authority cited shows he can not do this).

Mr. Sullivan: Whether they concede it or not, I have the record to prove that it was the same (p. 46, fol. 136) party, the same assignment, the same transaction."

Folio 137:

"The Court: *Of course the subject matter must be the same.*

Mr. Freehill: We established that the contract was made with Alex Simpson, the father. He did not own the 'White City.' We joined the two owners of the 'White City,' as there was doubt about which of the parties was liable on the contract of towage. The Court held that the contract (fol. 138) was made with Alex Simpson, and that he had hired these two boys as his agents, and that Alex Simpson was responsible on the contract, but on that action we could not hold them for negligent towage, because we were suing on the agreement.

The Court: Mr. Sullivan has pleaded *res judicata*. He must establish it to defeat your action. Now, what has he got that is proper evidence in the United States Court to establish the fact of this Municipal Court proceeding?

Mr. Sullivan: I have all the pleadings."

Identity of subject-matter and person in the State and United States Courts are conceded as a matter of record at page 47, folio 139:

"Mr. Freehill: Take the copy of the complaint. I concede that these papers are the file papers in the Municipal Court. They show the entire subject matter and the persons connected with it, and establish the identity of the subject matter and those parties in this action."

Discussion is continued through the balance of pages 47 and 48, where at folio 144, the Court admits in evidence the amended complaint in the Municipal Court case annexed to claimants' answer and the same is marked Claimants' Exhibit A on the *res judicata* plea, and the Court also admitted in evidence the answer of the defendants in the same Municipal Court case and it is marked Claimants' Exhibit B on the *res judicata* issue (p. 49, fol. 145).

The Petition and Brief of Petitioner.

The "Petition and Brief for Writ of Certiorari" herein finally strips this prolonged litigation of all semblance of good faith and conformity to any known practice in the State or United States Courts.

At page 1, paragraph III, of that Petition and Brief, the petitioner defines his cause of action as follows:

> "III. The petitioner (libellant) instituted this action by filing of a libel and complaint against the respondent (vessel 'White City') for damages sustained to a motor yacht, the 'Drifter,' arising out of a breach of a contract of towage (pp. 4-7)."

The confusion, evasion and over-reaching on the part of the petitioner's counsel at the trial in the United States District Court as appears from the record (pp. 46, 47) caused the Court (p. 47, fol. 141) to make the following statement:

> "The Court: Why do you not put that in? Are you going to put the record in? I want to emphasize the fact that I believe in cases being tried like English cases, and it is going to meet with great displeasure on my part if anybody is going to be technical where technicalities are not necessary. Is that the record in the case?
>
> Mr. Sullivan: Here is the testimony."

Thereupon Mr. Freehill made the concession printed at page 47, folio 139, and the pleadings in the Municipal Court (Claimants' Exhibits A and B) were admitted in evidence (p. 48, fol. 144).

The petitioner has been engaged in his vexatious litigation for over five years (March 27th, 1926, p. 27, fol. 81, to the present, and this application will continue it to

October, 1931). He has been in two State Courts where he finally lost and has been in two United States Courts where he finally lost. He is now seeking to enter a fifth court, not as a matter of right but as a matter of judicial discretion and courtesy. The amount of the judgment involved is $1,410.35. No new question of law is involved. The question now sought to be raised has been passed on by the United States Supreme Court. This is conceded in petitioner's brief at page 10, Point I. That brief is devoid of any reason or shadow of a reason why the doctrine of *stare decisis* should be changed. What the petitioner has done, is the best proof that that doctrine should be continued as a check to this sham and fraudulent litigation.

This is the reason why this analysis of the petitioner's record is made. We are submitting these items to show the Court that this application and action are without merit, vexatious and an abuse of the processes of the State and United States Courts.

The character of this application is fixed and determined by the contents of the record now before the Court.

The question first to be settled is, does the petitioner come into this court with clean hands?

Has he a substantial grievance inherent in the facts and within the established law?

Is he engaged in fabricating a grievance?

The record now before the Court answers all these questions and that record has been made by the petitioner. "His sins have found him out."

The temerity of the petitioner and those acting with him is such, that they still continue at their attempts at deception in this Court.

The petitioner in his brief (as above quoted), page 1, says his libel and complaint "arise out of a breach of contract."

This contract is printed at pages 297-298.

The petitioner's attorney at page 40, fol. 120, in opening his case to the United States District Court, made this statement:

> "Mr. Freehill: The action was brought against the 'White City' in rem for negligence."

This is incorrect as a matter of record (pp. 4 to 7), also *The White City*, 48 F. (2d) 557, and petitioner's brief, page 1, paragraph III.

The petitioner's attorney at page 45, folio 135, referring to the action in the Municipal Court, made the following statement:

> "Mr. Freehill: It was an action on contract there, *not for negligence.*"

This statement is incorrect as a matter of record. (Amended Complaint, pp. 30, 31.)

These conflicting positions of the petitioner continue at page 4 of his petition and brief (Item 4, subdivision a) where he speaks of "bailee."

There is nothing in what he describes as his "libel and complaint" (his brief, p. 1, Item III), or the "libel and complaint" printed at pages 4 to 7, that refers to "bailee" or negligence. Towing the "Drifter" (p. 4) does not make the "White City" a bailee so as to give rise to any adverse presumptions. The contract of towing must be alleged; the pleading on its face must show the facts from which the Court may be advised of what specific duties were assumed by the tug; whether or not it was a bailee with the terms of the bailment; and how and in what manner those duties were violated by the tug. The word "tug" does not take the place of a libel or complaint; and the same applies to the word "tow." The words "tug" and "tow" may be mentioned in a contract. Standing alone, they have no value as a pleading. The only thing that has any value in a

pleading is the contract. The contract is a fact that must be proven. Without a contract, expressed or implied, there can be no libel or complaint and no cause of action.

On these matters, the "libel and complaint" give no information. If the pleader had any idea on the subject, he incorrectly concluded by calling the "White City" a tug (which he knew was only a pleasure boat, called in an emergency, p. 80, fol. 238; p. 82, fol. 244; p. 96, fol. 287) and stating that it received the "Drifter" in good condition (p. 4, fol. 11) and delivered it in damaged condition (p. 5, fol. 14) is not a good complaint. If these words can be construed as stating a cause of action of any character, the most that can be said is, that it is a towage contract, simpliciter, and it has been so held by the United States Circuit Court of Appeals (48 F. [2d] 557) in this action where it cites direct and controlling decisions from the United States Supreme Court (*The Webb,* 14 Wall. 406, 20 L. Ed. 774; *Eastern Transportation Line* v. *Hope,* 95 U. S. 297, 24 L. Ed. 447).

Additional incorrect statements in the "petition and Brief for Writ of Certiorari."

In the "Subject Index" to petitioner's brief, under Point I, there it is stated:

> "Particularly where the tow is manned only by a servant or bargee who is not present during the period when the damage to the tow takes place."

The bargee represented by Captain Weston was present and directed the towing until he abandoned the tow on the night of Oct. 19, 1925. Abandonment is negligence.

There is no proof in the case as to when, or where or how, the "Drifter" was damaged except that given by petitioner's witness, Patrick S. Jolly, a marine surveyor, who at page 149, where the damage was under consideration:

"Q. Well, suppose we try to solve the mystery?

A. I don't know just what you are trying to get at.

Q. Have you any idea what could have caused that? (fol. 446).

A. I would say it was caused by either a drift log or bumping up against the dock or something—looked to me like it was done by a log or piling of some sort."

At page 147 (same witness) folio 439, referring to the point of damage to the "Drifter," he describes it as follows:

"Q. It was not a hole?

A. It was not what I call a hole, no."

At page 143, folio 429, he makes the same statement. Page 144, folio 430:

"Q. Describe this indentation you speak of. Was it round or oblong or what was its form?

A. Its formation, as I remember it, was what you call round."

At page 143, folio 429:

"Q. Describe the part you say was broken?

A. Why, her hull plating was broken on the starboard side amidships just above the water line—or at the water line."

Page 376, folios 88-89, William A. Rhodes testifying:

"A. The damage appears to have been done through impact."

"With some object—some floating object."

The damage to the "Drifter" was about an inch above the water line (p. 377, fol. 93).

The testimony of the petitioner's witness Jolly, the marine surveyor, taken in connection with that of Herbert N. Simpson, Alexander Simpson and William A. Rhodes, remove all doubt as to the most probable cause of the damage to the "Drifter" at the water line. As appears from the above, the indentation was round. Logs are usually round. The damage was at the water line. The log must have been submerged in whole or in part depending upon the action of the wind, the waves and tides (pp. 94-95). The entire course of the tow was through tide water. There was no protection placed on or around the "Drifter" by the Consolidated Shipbuilding Corporation to protect it from the ever present drift-wood and other causes of danger that infest these navigable waters. The "Drifter" with its thin shell (½ inch) was not made to be operated in such rough and dangerous waters.

At page 8 of petitioner's brief (top line) it is stated:

> "During the night it (the "Drifter") was not guarded by any watchman."

This is incorrect; it was guarded by two watchmen, Herbert N. Simpson and William A. Rhodes who stayed on the "White City" about ten or fifteen feet from the "Drifter" (p. 88, fols. 262 to 264).

It should be here stated, that the testimony of the witness Roos above quoted, showed that the Consolidated Shipbuilding Corporation placed its own Captain, Captain Weston, on the "Drifter" to remain on it until it was delivered at Port Newark. He abandoned it about 7:30 on the night of October 19th, 1925.

The "Drifter" was moored *"inside in smooth water and big, round rubber tires, fenders, to fend her off from the dock, so that she wouldn't bang or scratch or hurt herself"* (p. 88 fol. 262).

Therefore, the maximum precaution was taken by the owners of the "White City" although there is nothing in the contract that called for any act they did.

No harm came to the "Drifter" at that time or place.

At page 12 of petitioner's brief, reference is made to Captain Weston who is there described as "a colored laborer, *and employee of the Consolidated Shipbuilding Corporation* which built the 'Drifter.' Whether he was a 'laborer' or 'colored' does not change the fact that he was *'an employee of the Consolidated Shipbuilding Corporation'* and placed in charge of the towing by it." It must stand by its own act.

This "colored" man and "laborer" however, is correctly described by Mr. Roos who was present when the towing was arranged and started. At page 62, folios 184-185, he says:

> "He (Captain Weston) worked for Tom Turner. He had been a captain on boats and engineer. I had known him for many years before this. He was competent to perform his duties.
>
> Q. Was he in charge of the 'Drifter'?
>
> A. Yes, sir."

At the fourth paragraph of petitioner's brief, page 12, his attorney seeks to excuse the abandonment of the "Drifter" by Captain Weston and the towing, by intimating that Mr. Rhodes of the "White City" consented to the departure of Captain Weston before the trip was finished. There is no such testimony. The testimony is to the contrary. At page 90, folio 268:

> "Q. What time did Weston leave the tow?
>
> A. On the 19th, the night before, around 7 or 7:30, *after he had the boat tied up alongside of the pier.* He said, *'I'm not going to stay around here all night.'* ".

Page 104, folio 310:

> "Q. Were you present at the time Mr. Rhodes spoke to Mr. Weston about leaving, that he could go home that night?

A. He wasn't told he could go home, no, sir. He said he was going home."

Captain Weston was called as a witness at the trial in the State Court (p. 90, fol. 268) *by the petitioner. At the close of that trial, the petitioner lost his action against the owners of the "White City."*

The petitioner did not call Captain Weston as a witness in the trial in the United States District Court where Judge Woolsey asked the petitioner's counsel this question:

"The Court: What has become of Mr. Weston?
Mr. Freehill: He has left the employ of the Consolidated and we can't find him."

Mr. Freehill did not state what, if any, effort was made to find Captain Weston; he did not state that he issued a subpoena for him.

It might be here stated, that boat captains can be easily found in New York City.

At page 13 of petitioner's brief, reference is made to pages 27, 28, (Supp. Vol.) and that reference is followed by the statement, the "master" of the "White City" consented to the departure of Captain Weston. There is no reference whatever to this point on page 27 (also p. 373). At page 28 (also 374) folios 82-83:

"Captain Weston asked to be excused. I didn't see any reason why he should stay. As far as I was concerned, I didn't see any reason either why he should stay. It wasn't my business to know any reason."

Mr. Rhodes had no control over Captain Weston. Captain Weston, as the quoted testimony shows, was an employee in charge of the towing and manned the "Drifter."

The testimony of the cashier, Mr. Bolen, of the Shipbuilding Corporation is quoted above; he stated that Cap-

tain Weston left with the "White City" and the "Drifter" on October 19th, 1925, to go to Port Newark, to make delivery of the "Drifter" and that the reason he went was "they didn't have sufficient help on the boat to take care of it" (pp. 285-286):

The counsel for the petitioner seemed to think it was important to have it appear that Mr. Rhodes of the "White City" consented to the abandonmentof the towing by Captain Weston of the Consolidated Shipbuilding Corporation, although Mr. Rhodes had no control in the premises.

Mr. Freehill's long effort in this direction ends at page 393, folios 140-141:

> "Q. Then you sent him home, didn't you?
> A. I did not.
> Q. You just told him to go?
> A. If he wished."

At page 7, of petitioner's brief (3rd paragraph), it is stated that it was conceded that the "Drifter" was in good condition and it cites pages 71, 78. At page 71, the petitioner's own witness, Albert Bauer, testifies; he certainly could make no concession on behalf of the "White City." Besides he expressly testifies at that page at folio 212, in answer to the attorney for the petitioner:

> "Q. Were you present on the morning of October 19th, 1925, when the "White City" took the "Drifter" in tow at Morris Dock?
> A. No."

The only testimony at page 78 relating to the condition of the "Drifter" on said October 19th, 1925, is as follows:

> "Q. At that time the "Drifter" was in good condition, was she not?
> A. As far as I could see. I could not see anything wrong with her. I wasn't close enough to her."

It is repugnant to the English language to deduce a concession out of this testimony.

As appears from the foregoing, the petitioner at various times since this litigation was started on March 27th, 1926, (p. 27, fol. 81) has been constantly engaged in taking conflicting positions, all based on the contract contained in the letter from the Consolidated Shipbuilding Corporation, dated October 13th, 1925 (pp. 297-298).

1. His first complaint was against Alexander Simpson as sole defendant, on contract;

2. Then he brought into the action, the owners of the "White City" on a complaint in negligence (pp. 30-32);

3. On reaching the United States District Court, he stated to Judge Woolsey that the action against the owners in the State Court, was on contract (p. 46, fol. 138);

4. At page 40 in opening his case in the United States District Court, he states it is an action against the "White City" in rem for negligent towage;

5. In his petition of writ of certiorari, page 1, paragraph III, he says this action is brought for a "breach of contract of towage";

6. Now he seeks to transmute his ever changing complaint to one in bailment.

Having wholly failed in the courts he has been in, the petitioner now seeks to "bridge the chasm" by a "presumption" of negligence under an imaginary libel and complaint in bailment.

The petitioner, at last, recognizes that there is not one word in the record showing or tending to show any negligence on the part of the "White City."

The evidence offered on behalf of the petitioner forever precluded him from raising any question of negligence on the part of the "White City."

Page 394, folio 143:

"By Mr. Freehill:

"Q. Did you make this statement:

'We made the lines fast on the launch and the tow boat thoroughly supervised a proper mooring for the night.' * * *

A. I did" (Mr. Rhodes testifying).

POINT I.

The petitioner is asking the Court to change the doctrine of *stare decisis*.

The United States Circuit Court of Appeals in its decision and opinion in this case, has followed the law as settled in the United States Supreme Court.

In 48 F. (2d) 557, the United States Circuit Court of Appeals held in this action (The "White City") as follows:

> *"There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug."*

This holding is based on:

> *The Webb,* 14 Wall. 406; 20 L. Ed. 774;
> *Eastern Transportation Line* v. *Hope,* 95 U. S. 297; 24 L. Ed. 478.

These cases cite many other authorities and are widely cited themselves.

The Steamer Webb, 14 Wall. 413-414, the Court in its opinion states:

"The libel filed in this case against the steamer, to recover the damages sustained by the ship in consequence of the alleged careless and unskilful towage, and the first question is whether the towage was either unskilful or negligent.

It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be damages in which the result is a safe criterion by which to judge of the character of the act which has caused it."

In the case at bar "the character of the act" in and of itself furnishes a "safe criterion" by which to judge the act. This is supplemented by the testimony of the witnesses Jolly, Alexander Simpson, William A. Rhodes and Herbert N. Simpson, herein quoted. There is no conflict in their testimony and as we view it, it points unerringly to the perils of the sea as the cause of the damage to the "Drifter." How the "White City" could be in possession of the "Drifter," especially that part of it at and below the water-line and in direct contact with the water with Captain Weston in charge of the "Drifter," with the "White City" forty feet away, is beyond our understanding, and none of the many authorities we have examined and quoted, has gone far enough to give us any help in that direction. This brings this branch of the case so far

as attempting to hold the "White City" is concerned into the realms of conjecture, and under the authorities, this is not permitted.

Liability ends where conjecture begins.

If the perils of the sea did not cause the damage, what did cause it? There is no answer to this in the record.

Transportation Line v. *Hope,* 95 U. S. 299-300, the Court held:

> "While it was very well to ask a charge that the transporter of the boat was not a bailee, and perhaps that the boat was not within his exclusive control, and that only ordinary care and diligence were required on his part, it was quite incorrect to ask a charge that the boat was within the possession and the exclusive care and control of her owner.
>
> The transportation company did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee, and it was not bound to the extraordinary duties and liabilities of a common carrier. *Alexander* v. *Greene,* 3 Hill (N. Y.) 9."

The "White City" was manned by its owners and the "Drifter" and cradle were manned by their owners.

Transportation Line v. *Hope,* 95 U. S. 297, states as follows:

> "Although a transportation company, engaged in towing the barge from one point to another, does not occupy the position of a common carrier, nor have that

> exclusive control of her which that relation would imply, it does have control of her to such extent as is necessary to enable it to fulfill its contract, and is, therefore, bound to exercise such degree of diligence and care as a skillful performance of the stipulated service requires."

The "White City" fulfilled this duty when on seeing the "Suscalanco" going to sea tied up at Fisher's Dock and reported the fact and 'phoned and received further orders. As appears from the evidence; Captain Weston joined in this precaution.

The Winnie (Circuit Court of Appeals, Second Circuit, December 4, 1906), 149 Fed. Rep. 725, holds:

> "A tug is not liable merely because a tow was injured while in its custody, but in an action against it to recover for the injury, the burden rests upon the libellant to affirmatively prove negligence or fault, which cannot be presumed merely because the injury is not otherwise accounted for."

As before stated, the petitioner has not and does not on the application point out any fault or negligence on the part of the "White City."

The Winnie, 149 Fed. Rep. 726-727, states as follows:

> "The burden was on the libellant to prove fault on the part of the tug; in this he failed. The testimony preponderates overwhelmingly in favor of the claimant to the effect that the tow was made up in the usual way. This being so we cannot escape the conclusion that liability cannot be predicated of a finding that the tow was made up in an unusual way. The libellant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel."

"It is not at all unlikely that the damage was caused by the swells of passing ferry boats, but the Court is not called upon to enter the realms of conjecture in an attempt to ascertain how the accident was caused. It is enough for the present case that the tug did not cause it. There was nothing in the condition of the wind, or water to make towing unusually hazardous. The master, according to the great preponderance of proof, exercised the reasonable care, caution and maritime skill required. The tug was not an insurer, and *cannot be held liable merely because the Fermoil received an injury while in her custody.*"

"The case is easily distinguishable from *The Gennessee,* 138 Fed. 549, 70 C. C. A. 673, where the make up of the tow was such as to invite disaster while the flotilla was lying to during a storm and the tug made no effort to mitigate the risks due to an unusually perilous situation."

The Clarence L. Blakeslee (Circuit Court of Appeals, Second Circuit, May 8, 1917), 243 Fed. Rep. 366, states:

"The rules regarding litigation such as this have been plainly and repeatedly stated by this Court:

1. "The mere fact that a tow receives injury does not render the tug liable; libellant must affirmatively prove negligence, which is not presumed merely because the injury is not otherwise accounted for. *The Winnie,* 149 Fed. 725, 79 C. C. A. 431."

2. "The tug is not an insurer, and is not responsible for a master's error of judgment. *The W. E. Gladwish,* 196 Fed. 490, 116 C. C. A. 185."

3. "Navigators are not to be charged with negligence, unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circum-

stances shown. *The Nannie Lamberton,* 85 Fed. 983, 29 C. C. A. 519."

4. "The line of demarcation between error of judgment and negligence is indicated in *The E. B. Conine,* 233 Fed. 987, 147 C. C. A. 661."

5. "*The Frederick R. Ives* (D. C.), 25 Fed. 447, shows facts quite like this case."

The Clarence L. Blakeslee, 243 Fed. Rep. 367, states:

"However this may be libellant cannot recover without affirmatively showing some act of negligence on the part of the tug, proximately resulting in injury to his boat. This has not been done, and the decree below is reversed, with costs in both courts."

United States v. *Port of Portland* (Circuit Court of Appeals, Ninth Circuit, August 4, 1924, rehearing denied September 2, 1924), 300 Fed. Rep. 727, states:

"The mere fact that the tow was injured raises no presumption of fault on the part of the tug. We find no ground upon which to hold that a cause of action exists against the owner of the tug."

The Atlantic City, 241 Fed. Rep. 64, holds:

"It is well settled that a tug, or other vessel acting as such, is not a common carrier. *The Margaret,* 94 U. S. 494, 24 L. Ed. 146. She is only bound to exercise reasonable care and skill in performing the service which she has undertaken. The facts, therefore, that an accident happens to the tow does not of itself give rise to any presumption of negligence on the part of the tug, and the burden of proof is upon the party seeking to charge the tug with liability. *The L. P. Dayton,* 120 U. S. 337, 351, 7 Sup. Ct. 568,

30 L. Ed. 669; *The J. P. Donaldson,* 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292. The master of the vessel towed has control of the loading and is responsible therefor."

The Buttercup v. *United States,* 8 Fed. Rep. (2d) 282, also approves of the rules laid down in the *Blakeslee* case. *The Sea King,* 265 Fed. Rep. 418, holds as follows:

"Upon the evidence, I am not satisfied to the contrary. The evidence fails to establish how or where the accident occurred. No satisfactory conclusion can be reached on either point. The cause of the accident, whether submerged obstacle, sunken wreck, uncharted rock, or known shoal, remains entirely conjectural."

"The tug was not an insurer. The libellants, in order to recover, must prove that the injuries to the barge were caused by negligence on the tug's part *The R. B. Little,* 215 Fed. 87, 131 C. C. A. 395 (C. C. A. 2d Cir.); and that they have failed to do."

Dameron-White Co. v. *Angola Transfer Co.,* 19 F. (2d) 14, held:

"The tug is not responsible for accidents occurring through the unseaworthiness of the tow for the intended voyage, unless her unseaworthy condition is disclosed, or is so apparent that it would be negligent of the tug to attempt to proceed."

Southgate v. *Eastern Transp. Co.,* 21 F. (2d) 47, states:

"Vessel, seeking tow-boat's services, represents that it is seaworthy for voyage anticipated, and the tug may assume that it will carry competent and sufficient crew."

"Accident to tow does not raise presumption of negligence of tug, burden of proof thereof being on person asserting liability."

"Tug held not liable to barge, not properly manned and equipped, for losses from drifting and stranding after anchoring during storm."

Cleary Bros., Inc. v. *Port Reading R. Co.*, 29 F. (2d) 496, states:

"Libellant, seeking recovery against tug, has burden to prove respondent's negligence was proximate cause of damage."

"In libel proceeding against tug for damages to tow, libellant has burden of proof, and must show that respondent's negligence was not only one cause, but was the proximate cause of damage."

The Radnor, 21 F. (2d) 982, holds:

"Tug is not insurer; loss of tow raises no presumption of fault against tug."

"Towing tug is not insurer, but is only bound to exercise reasonable skill and care, and mere loss of tow raises no presumption of fault against the tug."

"A tow, sinking under normal conditions is presumed unseaworthy, unless mishandled."

The Sea Lion, 12 F. (2d) 124, states as follows:

"Owner of tow, to recover for its loss, must show that it was seaworthy for voyage contemplated at season in question."

The Bear, 11 F. (2d) 607, held:

"No recovery can be had of a tug for injury to its tow, merely because of taking it through floating ice, soft and broken by tugs."

"There is no presumption of negligence from injury to towing; but negligence, which was proximate cause, must be proved as pleaded."

POINT II.

The United States District Court rendered its decision under a libel not before the Court.

The decision and opinion of Justice Woolsey are printed at page 306 and at folios 919, 920, he there holds that the libel is based on contract as appears from the following:

> "The libel herein, *which sounds in contract,* alleges that the 'Drifter' and her cradle were delivered to the 'White City' in good condition at Morris Heights and were delivered by the 'White City' at Port Newark in a damaged condition."

There are four reasons why the Court could not so proceed and assume that the libel "sounded in contract" and make a decision as though such a libel, complaint or cause of action were before it:

1. Because of the law as settled by the United States Supreme Court;

2. Because the pleader who appeared for the petitioner defined his cause of action at the opening of the trial and elected to try and did try his case on a cause of action confined to an action against the "White City" in rem for *negligence* in towage (p. 40, fol. 120);

3. Because the uncontradicted evidence and the law showed there was no bailment;

4. A towage contract, simpliciter, does not place the tow in bail to the tug.

The John G. Stevens, 170 U. S. 125, holds as follows:

> "This Court more than once, has directly affirmed that a suit by the owner of a tow against her tug, to

recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu.*"

Mr. Freehill, trial attorney for the petitioner in the United States District Court, made it very clear, indeed, that this action in that Court was for *negligence* in towage.

In opening his case at page 40, folio 120, he stated to the Court:

"This action was brought against the 'White City' in rem for *negligence* towage."

At page 45, folio 135, Mr. Freehill explained that the action in the State Court (the Municipal Court) was on contract and "not for *negligent* towage." His idea was that a change in *"issues"* would avoid the defense of *res judicata.*

Mr. Freehill again makes it clear (p. 46, fol. 138) that the action was on contract in the Municipal Court and not negligence. Mr. Freehill was confronted with the plea of *res judicata* because of the identity of subject matter and person and complaint in the Municipal Court with that in the United States District Court. His idea was, that if he made it appear that his former action in the Municipal Court was on contract and that his libel was an action "in rem for *negligence* in towage," that he would have different *"issues."* At page 46, folio 137, this is made clear:

"Mr. Freehill: He must prove that the *issues* are identical with those here, and that the parties are the same."

Later in the trial in the United States District Court after the record in the Municipal Court was produced, Mr. Freehill admitted "identity of subject matter and parties" (p. 47, fol. 139).

He proceeded and tried his case in great detail, with many witnesses and exhibits to establish his libel *"in rem for negligence in towage."*

The petitioner, through his counsel, had the exclusive right to define his libel, complaint and cause of action, and having done that he had no alternative; he had to succeed or fail on his election. He chose to confine his libel to an action "in rem for *negligence*" and the District Judge had no power after the case was so tried to decide it under a different theory or libel because there was no different theory or libel before him.

Pope v. *Kelly,* 30 App. Div. 254, has passed on this point; it is there held:

> "The plaintiffs are entitled to maintain their theory, whether right or wrong, until the question is decided by demurrer or a trial."

O'Brien v. *Blunt,* 5 App. Div. 223, it is held:

> "That the order was improper in that the plaintiffs had been required to separate and separately state and number alleged different causes of action, *when their theory of the action was that the complaint stated but a single cause of action."*

Weed v. *The First National Bank,* 106 App. Div. 287-288, quotes the ruling in the *O'Brien* case (5 App Div. 223) and approves and follows it:

Varuch v. *Young,* 149 App. Div. 466-467, follows the rule above stated.

As appears from the foregoing the United States District Judge rendered his decision under a complaint that was not before him on evidence that did not sustain it or any other cause of action.

A similar situation arose in *People* v. *Dumar,* 106 N. Y. 508, where the Court held:

> "As to the act charged, there was no proof."

In the libel, the act charged was *"negligence"* as asserted by the petitioner's counsel, for which there was no proof. The decision was rendered under a libel *"sounding in contract"* which was not before the court.

The evidence before the court affirmatively showed that there was no *negligence* and no breach of a contract of bailment.

POINT III.

The tow "Drifter" was not in bail to the "White City."

What possible reason would the "White City" have to charter the yacht "Drifter" and its cradle? What would it do with the cradle?

The rights, duties and obligations of the Consolidated Shipbuilding Corporation and Alexander Simpson, the sole contracting parties to the contract, were fixed by the contract for the towage (pp. 297-298).

The "White City" was not a party to that contract.

This contract was changed before the date of towing; the work boat "Hilda" was disabled and out of repair.

By mutual consent the "White City" a small motor-boat used for passenger service and owned by two "boys" was substituted in the emergency and for that reason the towing did not start until 9 A. M., October 19th, 1925.

The best method of interpreting this contract is the one used by the parties to it. What did they do under it?

The Consolidated Shipbuilding Corporation consented to the substitution of the "White City" a passenger motor-boat, in place of the work boat "Hilda" that became disabled before the towing started. In fact it suggested it.

It consented to the change in the hour of starting.

It used its own ropes, hawsers, etc.

It arranged and started the tow.

It placed its own Captain Weston on the "Drifter" who directed the tow until he abandoned it at Fisher's Dock.

It fixed the course of the tow, its point of departure and destination.

It never parted with supervision of the towing.

It was in full possession of the towing of the "Drifter" and cradle and directed the "White City," the propelling power.

It received the tow at the point of destination. The "Drifter" and cradle were never out of its possession and control.

It sent the tow through dangerous waters against the advice of Alexander Simpson.

It knew the inherent perils of the sea.

It sent the "Drifter" through these dangerous waters whose exterior coverings was only a half inch thick without protecting its sides by placing it inside the crade to protect the "Drifter" from logs and float-wood. The cradle was built to contain the "Drifter" and protect it from exterior injury.

The motor-boat "White City" called into service in an emergency to furnish propelling power to another pleasure yacht to take it from one point to another, was not a conventional tow boat; that was evident from its appearance.

While the "boys" who owned the "White City" and manned it, received a small sum for their trouble, which was one-half of what a regular tug would have charged, their status was not that of a duly licensed tug boat. They did not seek the engagement; they made no representation that they operated a tug. Their license was a motor-boat license.

Their status was the same as a pleasure boat out on the waters finding another pleasure boat in distress, helps it to port.

Surely if one pleasure automobile finds another pleasure automobile in distress and tows it to the nearest garage, that act does not impose the duties of a truck on it, even

if it receives some small compensation by way of agreement or gratuity.

Such an act in a white man's country is considered an honorable and generous act and is never used or attempted to be used as a trap to separate the volunteer from his money.

There is no act inherently dishonorable and dishonest, that has ever received the approval of any American Court.

The act that the petitioner is trying to torture into a grievance, is unconscionable.

POINT IV.

In this application the petitioner again changes his position. He now seeks to sustain a judgment in the United States District Court granted on the theory of a "libel sounding in contract" by citing the rules confined to and peculiar to *negligence* which is *ex delicto*.

Under the title *"Subject Index,"* the petitioner states three points on which he bases his petition. The first point is not confined to this record as appears from the citations of the evidence from the record quoted in the foregoing statement of facts. The other two points revert back to the theory of negligence which the United States District Court did not follow in making its decision.

The petitioner's brief brings himself squarely within the authorities cited by respondents in their brief at Point I, which show that the petitioner has no just claim or grievance. The law specifically excludes each of them.

It was error for the United States District Court to hold (p. 310, fols. 928-929) that:

> "The owners of the 'White City' became bailee of the 'Drifter' and her cradle on their delivery to the 'White City' at Morris Heights"; and

"This principle has been repeatedly enforced in cases of bailment arising under *charter parties.*"

As appears in Respondents' Brief, Point I, the United States Circuit Court of Appeals (48 F. [2d] 557) following and quoting the authority of the decisions of the United States Supreme Court, held:

"There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug."

The contract in the case at bar is not one

"Under charter parties."

This appears from the citations referred to in the decision and opinion in the United States District Court.

The term or contract called *"charter parties"* has, from the earliest times, had a clear and definite meaning and application. The most comprehensive definition with illustrations of this term is printed in Bouvier's Law Dictionary (1928). It is as follows:

"Charter party: A contract of affreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight."

The case at bar has no resemblance to *"Charter party."*

In the case at bar, the "White City" did not charter the "Drifter" or cradle. The contract in the case at bar (pp. 297-298) provided for a limited service to be rendered by which the "White City" was to furnish propelling power to the end that the Consolidated Shipbuilding Corporation could make delivery of the "Drifter" it built for T. C. Frost, from one point to another point; from its shipyard

at Morris Heights, New York, to Port Newark, New Jersey, to be there received by it and by it to be loaded on an outgoing ship for Texas. This company placed its own captain on the "Drifter" and in charge of the tow to stay there until it made delivery at Port Newark. In the course of the voyage, Captain Weston left the tow at Fisher's Dock, about five miles from Port Newark. This left the tow insufficiently manned. This was a wrongful act on the part of the tow; it amounted to abandonment on the part of the one-man crew on the "Drifter," put there by the Consolidated Shipbuilding Corporation.

The "White City" being in strange waters twenty or twenty-five miles from the starting point, and about five miles from the point of destination with night and darkness at hand, 'phoned for and received further orders given by the Consolidated Shipbuilding Corporation, and complied with them. The owners of the "White City" avoided the dangers of the night by mooring at Fisher's Dock as per changed orders and placing fenders on the "Drifter" and remaining on the "White City" moored ten or fifteen feet from the "Drifter" all of the night.

On the morning of October 20th, 1925, Herbert N. Simpson, one of the two crew on the "White City" took the place of Captain Weston on the "Drifter," which Captain Weston had abandoned the night before, and the tow as reorganized, waited for daylight and then proceeded to Port Newark where the tow was met by Mr. Bauer of the Consolidated Shipbuilding Corporation who received and took charge of it.

These facts cannot be transmuted into a *"charter party."*

They were when they developed and still are *"a towage contract, simpliciter, and did not put the tow in bail to the tug."*

POINT V.

The decision in the United States District Court was based on the following erroneous finding not within the terms of the contract:

> **"I believe (p. 309, fol. 927) the libellant's witnesses that the 'Drifter' and the cradle were damaged when they arrived, that a receipt was given to Rhodes one of the claimants here, now dead, reciting the damage, that he accepted this without protest, and that neither Rhodes nor Simpson could explain when, how or where the damage happened."**

This was error; it made the "White City" a bailee, insurer and common carrier.

There was no claim that the cradle was damaged and there is not a word of evidence to that effect. The only claim made was confined to the "Drifter."

The man who could, if anybody could, explain the damage to the "Drifter" was the person who manned it. That was Captain Weston placed in possession of the "Drifter" and cradle and directed the tow until he abandoned it. He was in the employment of and placed in charge by the Consolidated Shipbuilding Corporation.

The petitioner called Captain Weston as a witness in the State Court trial and lost his action there as against the owners of the "White City."

The petitioner did not call Captain Weston as a witness at the trial in the United States District Court.

Delaware Dredging Co. v. *Graham, The J. D. Graham,* 43 F. (2d) 852, was a charter party contract. In that case, the tow sank and the tug was unable to explain the cause

of the sinking. The owner was not on the tug. There, as in the case at bar, no negligence was shown against the tug.

In that case as here, the tug did not rest its case upon proof of delivery and failure to return, but produced testimony showing all the circumstances of loss. The libel was dismissed. The Court (43 F. [2d] 852), held as follows:

> "Where the bailor does not rest his case upon proof of delivery and failure to return, but produces evidence showing all circumstances of loss, his case fails unless bailee's negligence affirmatively appears from such proof."

In *Southern Ry.* v. *Prescott*, 240 U. S. 640 , holds as follows:

> "The railroad company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. The burden did not shift. As it is the duty of the warehousemen to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. *If, however, it appears that the loss is due to fire, that fact, in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence.*"

"Cyc." Vol. 36, page 74, states the rule to be as follows:

> "Generally where a defect in a vessel develops without any apparent cause, it is presumed to have existed when the service began."

Work v. *Leathers*, 97 U. S. 379.

"Cyc.," Vol. 36, page 74, states:

"The burden of proving seaworthiness is on the owner."

Ames v. *Belden,* 17 Barb. 513, holds as follows:

"Contracts of bailment, when it is sought to enlarge the liability of the bailee, should not be expounded unfavorably to the bailee, beyond the *obvious scope of the terms of the agreement.* Therefore, a covenant to insure should never be implied; a covenant of that nature not appertaining to contracts of bailment."

"By a clause in a charter party, binding the charterer to return the boats at a given period in as good condition as they now are, with the exception of the ordinary use and wear, the charter does not undertake to become an insurer against the perils of the sea, or risks of navigation." To the same effect is *Hyland* v. *Paul,* 33 Barb. 241.

State v. *Meagher,* 44 Mo. 356, holds as follows:

"The care to be exercised by a bailee over property in his charge *must be graduated according to the character of the property,* its value and the convenience of its being made secure."

Work v. *Leathers,* 97 U. S. 379, holds:

"A defect in the vessel which is developed without any apparent cause is presumed to have existed when the service began."

The same case at page 380, continues:

"Where the owner of a vessel charters her, or offers her for freight, he is bound to see that she is seaworthy

and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear. * * * If a defect without any apparent cause be developed, it is to be presumed it existed when the service began." (*Talcot* v. *Commercial Insurance Co.*, 2 Johns. N. Y. 124.)

Young v. *Leary*, 135 N. Y. 576, part of the opinion is as follows:

"The contract in this case comes as it seems to us under another class which relates to the hiring for use of the thing hired and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused. If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand and without fault on the part of the bailee, he is excused."

POINT VI.

The petitioner's motions in the United States Circuit Court of Appeals for re-argument and for certification of questions of law (p. 419) were denied (p. 441).

The decision in the United States Circuit Court of Appeals was handed down April 6th, 1931 (p. 413). Its order directing that a mandate issue was dated April 13th, 1931 (p. 418).

The mandate is dated April 24th, 1931.

Judgment of reversal under the mandate was entered in the United States District Court on May 9th, 1931. Neither this judgment nor the mandate is printed in the Transcript of Record.

POINT VII.

Wherefore, respondents respectfully ask for an order denying the petitioner's application for a writ of certiorari with costs and disbursements.

Dated, New York, August 14th, 1931.

Respectfully submitted,

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